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No. 91-1111

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

HARTFORD FIRE INSURANCE CO., et al.,

Petitioners,

v.

STATE OF CALIFORNIA, et al.,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Date: November 19, 1992

QUESTION PRESENTED

The Washington Legal Foundation will address the following issue:

Whether agreements among primary insurers and reinsurers on such matters as standardized advisory insurance policy forms and terms of insurance constitute a "boycott" outside the exemption of the McCarran-Ferguson Act.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

No. 91-1111

HARTFORD FIRE INSURANCE CO., *et al.*

Petitioners,

v.

STATE OF CALIFORNIA, *et al.*

Respondents.

On Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center with more than 100,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial portion of its resources to promoting the interests of the free enterprise system. To that end, WLF has appeared before this Court as well as other state and federal courts in cases

of interest to the business community, particularly in the area of antitrust law. *See, e.g., Kansas v. Utilicorp United, Inc.*, 110 S. Ct. 2807 (1990).

WLF finds it curious that Respondents, who claim to support increased competitiveness within the insurance industry, seek that increased competitiveness by adding yet another layer of government regulation to what is already a highly regulated industry.

WLF recognizes that the nation's antitrust laws, when properly applied, can promote "free and unfettered competition as the rule of trade." *Northern Pacific Railway v. United States*, 356 U.S. 1, 4 (1958). WLF also recognizes, however, that if the antitrust laws are not applied effectively and rationally, they can become fetters upon competition and deny consumers the benefits of "unrestrained interaction of competitive forces." *Id.* Therefore, it is important that the courts interpret the antitrust laws to prohibit only conduct that actually reduces consumer welfare.

WLF is concerned that the court of appeals in this case failed to consider the adverse effects its decision could have on the availability of general liability insurance to consumers. More importantly, the court of appeals failed to give proper deference to the decision of Congress that consumers are best served by largely exempting the insurance industry from the strictures of the federal antitrust laws.

WLF believes that its experience in litigating issues of this sort may prove of assistance to the Court in its consideration of this case. WLF brings a unique perspective to the case because it is committed to promoting and defending "free and unfettered competition as the rule of trade" and has no other interest -- political or economic -- in the resolution of this case.

WLF submits this brief on behalf of Petitioners with the written consent of all parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF FACTS

In the interests of brevity, WLF hereby adopts by reference the Statement contained in Petitioners' brief.

In brief, Petitioners are four primary insurance companies (hereinafter referred to collectively as "Hartford") and their property-casualty rating and advisory organization, and six domestic reinsurance companies and their trade association. They are accused, in a civil antitrust action brought by Respondents (19 states and several municipalities and private entities), of having violated Section 1 of the Sherman Act, 15 U.S.C. § 1, by conspiring to reduce the availability of certain forms of general liability insurance.[1] This case comes before the Court on the issue of whether Respondents' claims are barred by the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, which largely exempts the insurance industry from federal antitrust law.

General liability insurance traditionally has been written on an "occurrence" basis, whereby liability coverage is provided for injuries or damage occurring during the policy period regardless when the claim is made. Petition Appendix A ("Pet. App.") 9a. Hartford was dissatisfied with "occurrence" basis coverage because of its "long tail" (*i.e.*, years after the policy had expired, a claim might be made upon it for an occurrence during the life of the policy). Pet. App. 9a-10a. Accordingly, Hartford took steps, beginning in 1984, to replace "occurrence" basis policies with "claims made" policies

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[1] General liability insurance indemnifies business and governmental entities against bodily injury and property damage claims by third parties.

whereby only claims made during the life of the policy would be paid. Pet. App. 10a.

Respondents allege that Hartford took a number of steps to ensure that the entire domestic insurance industry switched its general liability policies from an "occurrence" to a "claims made" basis.[2] In particular, Hartford persuaded major American and foreign reinsurance companies to refuse to provide reinsurance[3] for general liability insurance providing "occurrence" coverage. *Id.*

Hartford and the reinsurers then pressured Petitioner Insurance Services Office (ISO), an association of 1,400 property and casualty insurers that develops standard forms of insurance policies, to cease data collection and risk-estimation support for "occurrence" policies. Faced with the loss of statistical support from ISO and the unavailability of reinsurance for "occurrence" policies, other primary insurers that might otherwise have desired to continue offering "occurrence" policies soon thereafter largely ceased doing so. Pet. App. 10a-11a. Respondents then filed a series of lawsuits against Petitioners, alleging that they had been injured by the decreased availability of "occurrence" basis general liability insurance brought on by Petitioners' conduct.

The United States District Court for the Northern District of California accepted all of Respondents' factual allegations as true but nonetheless granted summary judgment for Petitioners. Pet. App. 33a-84a. It concluded that the challenged conduct was part of the "business of insurance" and therefore immune from the antitrust laws

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[2] Hartford is also alleged to have pushed for other restrictions on general liability insurance coverage, including exclusion of pollution liability coverage and limitations on coverage of litigation defense costs.

[3] Reinsurance is insurance for insurers. Purchasing reinsurance permits primary insurance companies to diminish the risk they have assumed from any individual insurance policy.

under the McCarran-Ferguson Act (the "McCarran Act"). Pet. App. 43a-50a. The court also held that Petitioners' alleged conduct did not fall within the "boycott" exception to the McCarran Act's antitrust exemption. Pet. App. 50a-58a.

The United States Court of Appeals for the Ninth Circuit reversed. Pet. App. 1a-32a. The Ninth Circuit held that Respondents had adequately alleged facts suggesting a "boycott" within the meaning of the McCarran Act and thus that Petitioners were not entitled to any exemption from the federal antitrust laws. Pet. App. 20a-25a.[4] On October 5, 1992, this Court granted Petitioners' petition for a writ of certiorari, to review the Ninth Circuit's decision.

SUMMARY OF ARGUMENT

This Court held in *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531 (1978), that the McCarran Act's "boycott" exception (to the antitrust exemption granted to "the business of insurance") does not apply to an agreement to fix rates and terms of coverage. The Ninth Circuit held that Respondents allegations' were sufficient to allege a "boycott," but it failed to meaningfully distinguish the facts of this case from the mere "agreement to fix rates and terms of coverage" that *Barry* found not to constitute a "boycott."

Three factors are relevant in determining whether concerted conduct amounts to a "boycott" for purposes of the McCarran Act. One such factor is whether there is some punitive, potentially crippling element to the conduct

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[4] The Ninth Circuit also held that Petitioners forfeited any antitrust immunity to which they otherwise were entitled when they entered into a conspiracy with foreign reinsurers who are beyond the reach of state insurance regulators. Pet. App. 17a-20a. WLF does not address that issue in this brief. The Ninth Circuit also rejected a defense based on the "state action" doctrine (Pet. App. 25a-27a); this Court declined to review that portion of the Ninth Circuit's decision.

directed at the target of the alleged boycott; if so, then the conduct is more likely to constitute a "boycott." A second factor is whether the alleged conspirators are consciously forsaking economically advantageous transactions. Those engaged in a "boycott" are likely to be willing to act against their own short-term economic interests in order to attain the long-term goals of the boycott. A third factor is whether the alleged conspirators are absolutely refusing to deal with targeted entities on any terms. Such absolute refusals to deal are an indication of a McCarran Act "boycott."

Applying those three factors to this case leads to the conclusion that Respondents have not adequately alleged a McCarran Act boycott. First, there is no indication that any primary insurers were ever threatened with any significant harm. Second, there is no evidence that any Petitioner ever passed up an advantageous business opportunity in furtherance of the alleged conspiracy; the reinsurance Petitioners declined to continue to offer general liability reinsurance on an "occurrence" basis solely because they viewed "occurrence" basis policies as a bad risk. Finally, there is not the slightest hint in this case of an absolute refusal to deal on any terms.

Moreover, Respondents' allegations clearly do not warrant treatment as a *per se* violation of the antitrust laws, since it is not apparent from the face of the complaint that Petitioners' alleged conduct had any anti-competitive effects whatsoever. Accordingly, Respondents have failed to adequately allege a McCarran Act "boycott" because only allegations of *per se* antitrust law violations can qualify as a McCarran Act boycott.

ARGUMENT

I. JOINT MARKETING ACTIVITIES WITHIN THE INSURANCE INDUSTRY GENERALLY ARE PRO-COMPETITIVE, A FACT RECOGNIZED BY CONGRESS WHEN IT ADOPTED THE McCARRAN ACT

Pervading the Ninth Circuit's decision in this case is a strong skepticism that any good can come from exempting the insurance industry from any portion of the antitrust laws. That skepticism overlooks unique aspects of the insurance industry that (as Congress recognized in adopting the McCarran Act) render it unsuitable for traditional antitrust law analysis.

Congress's objective in adopting the McCarran Act was to maximize the availability and affordability of insurance. Congress determined that that objective could best be achieved by encouraging the types of cooperative activities among competing insurance companies that are often frowned upon by the antitrust laws in other contexts. *See* H.R. Rep. No. 873, 78th Cong., 1st Sess. 8 (1943); S. Rep. No. 1112, 78th Cong., 2d Sess. 6 (1944). Congress identified several reasons why cooperative efforts ought to be encouraged within the insurance industry.

First, unlike virtually all other products, insurance must be priced before its most significant costs are known: the future losses against which the insurer indemnifies the insured. As Congress noted when it adopted the McCarran Act, the insurance industry faces unusual uncertainties because costs "are not within the control of insuring companies in the sense that the producer or manufacturer may control cost factors." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 221 (1979), quoting H.R. Rep. 873, 78th Cong., 1st Sess. 8-9 (1943). In order to minimize the possibility of inaccurate loss claims predictions that could lead to inefficient pricing, Congress recognized that "concert of action in the collection of statistical data" (normally

severely restricted under the antitrust laws) was a "necessity." *Group Life*, 440 U.S. at 221-222.

A second reason for immunizing insurance industry cooperation on coverage terms was Congress's recognition that standardization of insurance policies increases consumers' comprehension of and comfort with their policies. *See, e.g.*, 90 Cong. Rec. 6538 (1944)(statement of Rep. Springer); *id.* at 6556 (statement of Rep. Graham). The availability of numerous forms of the same type of insurance does not realistically provide the typical consumer with increased purchase options, given that he/she generally lacks the time, inclination, or ability to plough through the details of a multitude of insurance forms in order to choose one policy. Rather, Congress determined that consumers are best served by a system of state regulation that permits consumers to rely on the judgment of state government officials regarding the acceptability of insurance forms prepared by industry advisory organizations, and then to pick and choose among the approved forms to find the policy that best fits their needs.

Third, Congress recognized that permitting cooperative efforts on coverage terms would facilitate reinsurance and thus increase significantly the quantity of insurance coverage available to the consuming public. Congress considered reinsurance as vital to the underwriting of potentially catastrophic risks that no insurer could prudently underwrite on its own.[5] Yet, reinsurance is

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[5] Steps designed to increase the availability of reinsurance are unquestionably pro-competitive. As the Brokers & Reinsurance Markets Association ("Brokers") pointed out in its *amicus* brief in support of the Petition for Writ of Certiorari in this case, "reinsurance supplies the means for intensified competition among primary insurers by providing them with additional insurance capacity." Brokers Brief at 11. This capacity, in turn, permits primary insurers to write a greater premium volume, or to insure a wider diversity of risks or to offer higher insurance limits to policyholders, depending on the nature of the reinsurance. *See* Kramer, *The Nature of Reinsurance*, in (continued...)

generally agreed to in advance of issuance of the primary policy, and, as Congress recognized, "No company could safely agree in advance to reinsure, unless it knew what the terms of its obligations would be." H.R. Rep. No. 873, 78th Cong., 1st Sess. 9 (1943). Such advance knowledge of terms would be virtually impossible in the absence of industry cooperation on coverage terms.[6]

In sum, Congress has determined that, by and large, the interests of consumers are best served by a system of insurance regulation that relies principally on state regulators and is supplemented only occasionally by the federal antitrust laws. That system of state regulation has worked successfully for more than a century. Accordingly, the Ninth Circuit's aversion to finding any exemption to the antitrust laws is unwarranted; the decision in this case should turn on an inquiry into Congress's intention in adopting the McCarran Act, not on a misguided belief that broader application of the antitrust laws to the insurance industry would somehow have pro-competitive effects.

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[5] (...continued)
REINSURANCE 1, 30 (R. Strain ed., 1980); R. Carter, *REINSURANCE* 8-9, 65 (2d ed. 1983). These features of reinsurance are particularly important to small insurers with limited capital surplus because it permits them to compete with larger, better capitalized insurers. Brokers Brief at 11; *see* Kramer, *supra*, at 30.

[6] The McCarran Act also permits insurance companies -- provided they can obtain the concurrence of state regulators -- to establish standardized insurance premium rates. This case does not involve allegations of such collective ratemaking. While standardization of rates obviously is not pro-competitive (at least in the short term), Congress's decision to permit states to authorize such standardization was based on a desire to promote insurer solvency. *In re Workers Compensation Insurance Antitrust Litigation*, 574 F. Supp. 525, 528 n.2 (D. Minn. 1983).

II. *BARRY* REQUIRES A FINDING THAT THE "BOYCOTT" EXCEPTION TO THE McCARRAN ACT IS INAPPLICABLE TO THIS CASE

The McCarran Act exempts the insurance industry's activities from the federal antitrust laws to the extent that they are part of "the business of insurance," are "regulated by State Law," and are not "any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." Sections 2(b) and 3(b) of the McCarran Act, 15 U.S.C. §§ 1012(b), 1013(b). Petitioners contend that the court of appeals erred in ruling that their alleged activities constituted a "boycott" within the meaning of § 3(b) of the McCarran Act.[7] WLF concurs wholeheartedly in that contention.

The Court has had only one occasion to consider the scope of § 3(b), in *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531 (1978). The Ninth Circuit's interpretation of the § 3(b) "boycott" exception cannot be squared with *Barry*.

As *Barry* recognized, the McCarran Act was adopted in response to the Court's decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), and thus the Act's meaning is illuminated by reference to *South-Eastern*. *Barry*, 438 U.S. at 538-539. Prior to *South-Eastern*, it had been assumed, in light of *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869), that "the issuance of an insurance policy was not a transaction in interstate commerce and that the States enjoyed a virtually exclusive domain over the insurance industry." *Barry*, 438 U.S. at 538-539. *South-Eastern* held not only that insurance was subject to federal regulation under the Commerce Clause

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[7] Section 3(b) of the McCarran Act provides:

> Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

but also that Congress did not intend to exempt the insurance industry from the operation of the Sherman Act.

Congress essentially reversed *South-Eastern* when it adopted the McCarran Act the following year. Section 2(b) of the Act provided that "the business of insurance" would be totally exempt from federal antitrust law until June 1948 and thereafter would be exempt so long as it is "regulated by State Law." The one exception to that exemption was § 3(b)'s proviso that the Sherman Act would continue to be applicable "to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."

Section 3(b)'s reference to "boycott, coercion, or intimidation," although undefined in the McCarran Act, came directly from *South-Eastern*. In response to an argument that its *South-Eastern* decision was interfering with state regulation of insurance, the Court stated, "No states authorize combinations of insurance companies to coerce, intimidate, and boycott competitors and consumers in the manner here alleged,[8] and it cannot be that any companies have acquired a vested right to engage in such

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[8] The conspiring insurance companies allegedly:

> [N]ot only fixed premium rates and agents' commissions, but employed boycotts together with other types of coercion and intimidation to force non-member insurance companies into the conspiracies, and to compel persons who needed insurance to buy only from S.E.U.A. [South-Eastern Underwriters Association] members on S.E.U.A. terms. Companies not members of S.E.U.A. were cut off from the opportunity to reinsure their risks, and their services and facilities were disparaged; independent sales agencies who defiantly represented non-S.E.U.A. companies were punished by withdrawal of the right to represent the members of S.E.U.A.; and persons needing insurance who purchased from non-S.E.U.A. companies were threatened with boycotts and withdrawal of all patronage.

South-Eastern, 322 U.S. at 535-536.

destructive business practices." *South-Eastern*, 322 U.S. at 562.

Barry recognized that since *South-Eastern* was the source of § 3(b)'s "boycott, coerce, or intimidate" language and since the McCarran Act was adopted in direct response to *South-Eastern*, the types of conduct described by the *South-Eastern* Court as amounting to a "boycott" are highly relevant in discerning Congress's intent in using the word "boycott" in § 3(b). *Barry*, 438 U.S. at 546.[9] *Barry* made clear that the conduct at issue in *South-Eastern* (which included absolute refusals to deal with agents who represented non-S.E.U.A. companies and with potential customers who purchased insurance from non-S.E.U.A. companies) amounted to a § 3(b) "boycott." *Barry*, 438 U.S. at 549 n.22. *Barry* also held that the conduct alleged in that case (an absolute refusal by three of the four medical malpractice insurers in Rhode Island to provide coverage to customers of the fourth insurer, thereby forcing those customers to renew their policies -- under less favorable terms -- with the fourth insurer) amounted to a § 3(b) boycott. *Id.* at 552-553.

On the other hand, *Barry* recognized that there had to be clear limits on the scope of the § 3(b) boycott exception. Otherwise, the exception could swallow up the insurance industry's entire antitrust exemption, a result that would be wholly at odds with the stated purposes of the McCarran Act. *Id.* at 545 n.18. Justice Stewart's dissent warned against an overly broad interpretation of § 3(b):

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[9] *Barry* ultimately turned on an issue not relevant to this case: whether § 3(b) "boycotts" could encompass practices whose targets were insurance customers, or whether such "boycotts" were limited to practices targeted against insurance companies and agents. The Court determined that § 3(b) "boycotts" could exist without regard to the identity of the victim of the boycott. *Barry*, 438 U.S. at 552. Since Respondents allege that insurance companies were the target of Petitioners' alleged boycott, the issue that divided the *Barry* majority and dissenting opinions has no relevance to the outcome of this case.

> Most practices condemned by the Sherman Act can be cast as an act or agreement of "boycott, coercion, or intimidation." For example, price fixing can be seen either as a refusal to deal except at a uniform price (*i.e.*, a boycott), or as an agreement to force buyers to accept an offer on the sellers' terms (*i.e.*, coercion). Yet state-sanctioned price fixing immunized by § 2(b) was plainly not intended to fall within the § 3(b) exception. See 91 Cong. Rec. 1481 (1945)(remarks of Sen. Ferguson).

Id. at 559 n.6 (Stewart, J., dissenting). In response, the Court made clear that "a private agreement to fix rates and terms of coverage" is not a § 3(b) boycott and stated, "[W]e do not hold that all concerted activity violative of the Sherman Act comes within § 3(b)." *Id.* at 545 n.18, 553, 555.

The two fact patterns that the Court has identified as constituting §3(b) boycotts -- the fact patterns present in *South-Eastern* and *Barry* -- both involved absolute refusals to deal, *on any terms*, with the targets of the boycott. At the other extreme, *Barry* made clear that "mere" price fixing, without any additional joint conduct to enforce the price-fixing scheme, does not constitute a § 3(b) boycott. The Court has provided little guidance regarding how situations between those extremes are to be classified for § 3(b) purposes. Thus, as one court has described the situation:

> After [*Barry*] there appears to be an undesignated point, on the line between "mere price fixing" and an absolute refusal to deal, where enforcement activity in support of a conspiracy to fix prices gives rise to a "boycott" for purposes of the McCarran Act exemption.

In re Workers' Compensation Ins. Antitrust Litigation, 574 F. Supp. at 535.

There is considerable support in *Barry* for an argument that anything short of an absolute refusal to deal cannot as a matter of law constitute a § 3(b) boycott. For example, *Barry* stated:

> The conduct in question accords with the common understanding of a boycott. The four insurance companies that control the market in medical malpractice insurance are alleged to have agreed that three of the four would not deal *on any terms* with the policyholders of the fourth.

Barry, 438 U.S. at 552 (emphasis added). That statement suggests that the Court understood "the common understanding of a boycott" to include as a necessary element a refusal to deal with the target of one's boycott *on any terms*. Thus, one could argue, since the reinsurance Petitioners never absolutely refused to deal with any primary insurer, but rather simply refused to deal with those primary insurers except on terms acceptable to the reinsurers (*e.g.*, acceptance of general liability reinsurance only on a "claims made" rather than an "occurrence" basis), no § 3(b) boycott occurred.

Although there is much inherent appeal to limiting findings of § 3(b) boycotts to cases involving absolute concerted refusals to deal, such a rule is problematical because of the inherent difficulty in distinguishing between an absolute and a conditional concerted refusal to deal. It is almost always possible to characterize what seems intuitively to be an absolute refusal to deal as a conditional refusal. Thus, the *South-Eastern* defendants (who were engaged in what would commonly be described as a classic absolute-refusal-to-deal conspiracy) could have argued that they were engaged in mere conditional refusals to deal, because insurance agents and potential customers (who pursuant to the conspiracy would be boycotted if they dealt with non-S.E.U.A. insurance companies) were being told that the conspirators would be happy to continue doing business with them subject only to the condition that they never again do business with any non-S.E.U.A. members.

Or suppose that in this case the reinsurance Petitioners had determined never again to do business on *any* terms with any primary insurer that continued to write any amount of "occurrence" basis general liability insurance (an allegation *not* made in this case). Again, that scenario would seem to fit into the absolute concerted refusal to deal category. Nonetheless, any such reinsurance companies could assert that their concerted refusal to deal was merely conditional because they would be happy to continue doing business with the targeted primary insurers provided only that they agree as one of the terms of their contracts that the targeted companies would never again write "occurrence" basis insurance. In sum, while the absolute v. conditional refusal to deal distinction provides one basis for distinguishing conduct amounting to a § 3(b) boycott from conduct that does not, the inherent difficulties in distinguishing those two types of concerted refusals to deal renders unsatisfactory any attempt to rely solely on that distinction in deciding § 3(b) cases.

At the opposite extreme, Respondents attempt to label as a § 3(b) boycott *all* concerted action that goes beyond a mere private agreement to fix rates and terms of coverage. That attempt is without merit because it fails meaningfully to differentiate mere rate and term agreements from the types of conduct that Respondents categorize as § 3(b) boycotts. *Barry* recognized that "mere" private agreements by insurance companies to fix rates and terms of coverage are not § 3(b) boycotts and thus are immune from federal antitrust law. *Barry*, 438 U.S. at 545 n.18. Yet, as Justice Stewart pointed out, price fixing (and, for that matter, virtually any other practice condemned by the Sherman Act) can easily be "cast as an act or agreement of 'boycott, coercion, or intimidation.'" *Id.* at 560 n.6 (Stewart, J., dissenting). Since mere agreements to fix rates and terms of coverage can so easily be cast in the language of a boycott (*e.g.*, "a concerted refusal to deal except pursuant to specified rates and terms of coverage"), there is no meaningful distinction

between a mere agreement to fix terms of coverage and the conduct alleged to have occurred here.[10]

The Ninth Circuit never even attempted to provide such a distinction. The Ninth Circuit suggested that a § 3(b) boycott exists whenever the concerted activities of insurance companies create "economic exigencies" that impact upon those not party to the concerted activities. Pet. App. 25a. But surely a concerted activity such as a price fixing agreement will create such "economic exigencies," and yet *Barry* instructs that a price fixing agreement, without more, is not a § 3(b) boycott. Thus, the Ninth Circuit's "economic exigencies" rationale is insupportable.

This case requires that some distinction be made between concerted activities that constitute § 3(b) boycotts and those that do not. Accordingly, WLF respectfully suggests several factors that could form the basis for making such a distinction. One such factor is whether there is some punitive, potentially crippling element to the conduct directed at the target of the alleged boycott. As the district court recognized, "The crucial element . . . [of a boycott] is an effort to exclude or cause disadvantage to one or more competitors by cutting them off from trade relationships which are necessary to any firm trying to compete." Pet. App. 56a, quoting *In re Workers' Compensation Insurance Antitrust Litigation*, 867 F.2d 1552, 1561 n.14 (8th Cir.), *cert. denied*, 109 S. Ct. 3247 (1989). In other words, it is not enough simply to adopt a concerted trade practice that makes it more expensive for a competitor to conduct his business; a boycott requires conduct that threatens the competitor's ability to continue to compete.

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[10] In addition to having entered into an agreement to fix terms of insurance, Petitioners are alleged to have pressured ISO to cease providing data collection and risk-estimation support for "occurrence" policies, and Hartford is alleged to have induced the reinsurance Petitioners to refuse to provide reinsurance for "occurrence" policies.

This Court has recognized that distinction in differentiating *per se* antitrust violations from those that are subject to Rule of Reason analysis. As the Court noted in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284 (1985), the *per se* approach generally has been applied in those concerted-refusal-to-deal cases that have "involved joint efforts by a firm or firms to disadvantage competitors by 'either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle.' Sullivan, [*Law of Antitrust*] at 261-262 [1977]. . . In these cases, the boycott[s] often cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete." *Northwest Wholesale*, 472 U.S. at 294.

A second factor that serves to distinguish § 3(b) boycotts is an alleged conspirator's conscious forbearance from economically advantageous transactions. An insurance company engaging in a § 3(b) boycott will act against its own short-term economic interests (which interests would suggest pursuing profitable business opportunities with boycott targets) in order to attain the long-term goals of the boycott. Thus, three insurance companies in *Barry* agreed not to pursue profitable business opportunities with the fourth company's customers, as part of a long-term boycott plan to require all those seeking medical malpractice insurance to convert to "claims made" basis policies. Similarly, the defendants in *South-Eastern* agreed to forgo profitable business relationships with agents and customers who persisted in dealing with non-S.E.U.A. members, in order to attain the long-term goals of their boycott.[11]

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[11] This second factor also finds its analogue in concerted-refusal-to-deal cases in which the Court has considered whether to apply *per se* or Rule of Reason treatment. The Court has applied the *per se* approach in cases in which the challenged practices were "not justified by plausible arguments that they were intended to enhance efficiency and make markets more competitive." *Northwest Wholesale*, 472 U.S.

(continued...)

A third factor that serves to distinguish § 3(b) boycotts is the existence of an absolute refusal to deal on any terms. As noted above, distinguishing between absolute and conditional refusals to deal can be difficult. But there are cases where the defendant cannot recast his refusal to deal as anything other than an absolute refusal; such concerted refusals should almost always be characterized as § 3(b) boycotts. *Barry* was one such case; under *no* conditions were the three insurance companies willing to deal with the customers of the fourth company. The Court made clear in *Barry* that an absolute refusal to deal was one of the key characteristics of a § 3(b) boycott. *Barry*, 438 U.S. at 552. Accordingly, although the absence of an absolute refusal to deal[12] does not totally preclude a finding that a § 3(b) boycott exists, such absence suggests strongly that there is no § 3(b) boycott.

Applying the three factors outlined above leads to the conclusion that Respondents have not adequately alleged a § 3(b) boycott. First, there is no indication that any primary insurers were ever threatened with any significant harm. No one ever attempted to deny the "targeted" primary insurers access to their customer base, insurance agents, or the reinsurance market. While the unavailability of reinsurance for "occurrence" basis policies made it

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[11] (...continued)
at 294. Where an insurance company is acting against its own short-term economic self-interest in support of a concerted activity, the activity is both a *per se* antitrust violation and a § 3(b) boycott.

[12] A conditional refusal to deal in which one of the conditions for continuing to deal is that the target agree to alter the conduct of his business in matters not directly involving the party imposing the condition (*e.g.*, a refusal to write reinsurance for a primary insurer unless the primary insurer agrees to stop writing *any* amount of "occurrence" basis insurance) could be seen as the functional equivalent of an absolute refusal to deal. Such conditions are highly unlikely to enhance overall efficiency or make markets more competitive. Rather, they are likely designed to serve some anti-competitive purpose of the party imposing the condition.

more difficult for primary insurers to offer general liability insurance on that basis, no primary insurers were placed at a competitive disadvantage in relation to other primary insurers in attempting to offer "occurrence" basis policies.[13]

The second factor outlined above also supports a finding that no § 3(b) boycott existed in this case. The reinsurance companies that declined to offer reinsurance for "occurrence" basis policies did not thereby pass up any economically advantageous transactions. They declined to offer such reinsurance because they viewed "occurrence" basis policies as a bad risk -- due to their "long tail." That economic analysis of "occurrence" basis policies has been borne out by the continued unwillingness of the reinsurance industry -- eight years after the events giving rise to this suit -- to offer reinsurance on "occurrence" basis policies on a wide-spread basis. If it were economically advantageous for reinsurers to compete by offering such reinsurance, one could reasonably expect them to have begun doing so again by this time.

The third factor outlined above also suggests that Petitioners have not engaged in a § 3(b) boycott. There is not the slightest hint in this case of an absolute refusal to deal on any terms. The reinsurance Petitioners are not alleged to have discriminated against any primary insurers; they offered reinsurance to all primary insurers on equal terms. Although the reinsurance Petitioners refused to deal with primary insurers unless they were willing to

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[13] Nor could "targeted" primary insurers have any legitimate basis for complaining that ISO, an association of 1,400 primary insurers, had withdrawn its data collection and risk-estimation support for "occurrence" policies. Those primary insurers that had determined that they would no longer write "occurrence" policies obviously had no interest in financing (through their contributions to ISO) data collection and risk-estimation support for such policies. If there were sufficient numbers of primary insurers that still sought such data collection and risk-estimation support, one would have expected those insurers to band together (as they are permitted to do under the McCarran Act) for the purpose of providing such support.

meet a condition set by the reinsurance Petitioners (that no reinsurance be sought on "occurrence" basis policies), there is no allegation that that condition was imposed for any reason other than the advancement of the reinsurers' economic interests.

In sum, the Ninth Circuit's holding that Respondents have adequately alleged a § 3(b) boycott cannot be squared with *Barry* and this Court's rulings in concerted-refusal-to-deal cases.

III. RESPONDENTS HAVE FAILED TO ADEQUATELY ALLEGE A § 3(b) BOYCOTT IN THE ABSENCE OF EVIDENCE OF A *PER SE* ANTITRUST VIOLATION

References to "mere allegations of price fixing without more" give this case an air of economic unreality. The one issue that most economists can agree on -- whether they are supporters or opponents of strong enforcement of the antitrust laws -- is that price-fixing conspiracies are anti-competitive practices that in most instances should not be tolerated. The Court has long held that price fixing is a *per se* violation of the Sherman Act. *See, e.g., Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 344-348 (1982). Joint rate-setting practices are permitted in the insurance industry solely because Congress determined (in adopting the McCarran Act) that states should be permitted to sacrifice insurance price competition in the interest of ensuring the solvency of their insurance companies. Whatever other anti-competitive effects may arise from the insurance industry's antitrust exemption, they undoubtedly are trivial in comparison to the effect of its joint rate-setting authority.

Accordingly, it needs to be emphasized that *no allegations of price fixing have been raised in this case*. Petitioners are alleged to have entered into an agreement regarding acceptable coverage risks and then to have taken

steps "to bring about the use of policies that would limit their exposure." Pet. App. 55a.

The Ninth Circuit's expressions of horror at the "evil" (Pet. App. 23a) allegedly committed by Petitioners are out of proportion to the acts Petitioners are alleged to have undertaken in their attempts to bring "claims made" policies into common usage. Even the Solicitor General, while supporting the Ninth Circuit's § 3(b) boycott analysis, has admitted that "the economic impact" of Petitioners' conduct "is not immediately obvious" and thus that that conduct should not be condemned as a *per se* antitrust violation. Brief for the United States at 14-15.

In excepting agreements to "boycott, coerce, or intimidate" from the general antitrust exemption afforded to the business of insurance under the McCarran Act, Congress clearly had in mind continuing federal antitrust supervision of only the most egregious of anti-competitive behavior by the insurance industry. *Barry* makes clear that Congress did not include within that category of egregiously anti-competitive behavior "mere" price-fixing conspiracies that are "regulated by state law." Given the antipathy with which Congress generally has dealt with price fixing, if state-sanctioned insurance industry price fixing is generally outside the scope of the § 3(b) boycott exception, then it is hard to believe that the conduct at issue in this case (which appears to have been pro-competitive and at worst can be said to have had an uncertain effect upon competition) was intended by Congress to fall within the § 3(b) boycott exception.

If the Ninth Circuit's decision in this case is upheld, we can expect numerous lawsuits challenging the insurance industry's efforts to establish standardized forms of insurance. It is not a sufficient response to say that the industry will still be permitted to defend its conduct against antitrust challenge based on the Rule of Reason standard. If, as WLF contends, Congress never intended to subject the insurance industry to antitrust suits of this

sort, then insurance companies should not be required to defend their conduct in court.

Barry established that even some conduct found by this Court to constitute a *per se* violation of the Sherman Act (*e.g.*, price fixing) is not subject to the § 3(b) boycott exception. In light of Congress's purpose to subject only the most objectionable insurance industry conduct to the § 3(b) boycott exception, it stands to reason that conduct that does not amount to a *per se* violation of the Sherman Act can never constitute a § 3(b) boycott.

This Court has made clear that *per se* treatment should be applied sparingly in concerted refusal to deal cases. *Northwest Wholesale*, 472 U.S. at 297. Concerted refusals to deal are considered to be *per se* unreasonable only in "cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor." *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 458 (1986).[14] This cases clearly lacks any such allegations; Respondents have not claimed, for example, that the reinsurance Petitioners' refusal to provide reinsurance for "occurrence" basis policies was designed to discourage the targeted primary insurers from doing business with any of the reinsurers' competitors. Accordingly, Respondents have not alleged any *per se* violations of the Sherman Act. In the absence of such an allegation, Petitioners' conduct cannot constitute a § 3(b) boycott.

Providing a "safe-harbor" for insurance industry conduct that does not constitute a *per se* antitrust law violation would by no means leave the insurance industry unregulated -- any conduct of insurance companies, including conduct of the type at issue in this case, would still be subject to state regulation. But doing so would

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[14] Those were precisely the allegations in *South-Eastern*. Accordingly, that case clearly involved allegations of *per se* antitrust violations.

fully effectuate § 3(b)'s intent that, except for the most egregious of anti-competitive conduct, the "business of insurance" that is "regulated by State Law" be exempt from the federal antitrust laws.

CONCLUSION

Amicus curiae Washington Legal Foundation respectfully requests that the judgment of the United States Court of Appeals for the Ninth Circuit be reversed.

Respectfully submitted,

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